STATE OF MICHIGAN

COURT OF APPEALS

BERTHA MYERS,

Plaintiff-Appellant,

v

DEAN MYERS,

Defendant-Appellee.

UNPUBLISHED
October 21, 2003

No. 241298
Cass Circuit Court
LC No. 01-000617-NO

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant. We affirm.

I

On January 31, 1999, plaintiff Bertha Myers, then seventy-four years old, suffered a fractured leg at the home of her son, defendant Dean Myers, when her son's unrestrained 180-pound Great Dane dog bolted through a doorway, caught his head in her purse strap, and dragged her backwards down two steps onto a concrete patio.

In her deposition, plaintiff described the sequence of events leading up to her accident. On the day in question, plaintiff went to defendant's house for a birthday dinner for her grandson. She arrived at defendant's house with her husband, Glenn. After parking the car, plaintiff approached the rear door of defendant's house. She described the rear door as a "standard door" with a full-length glass panel insert. As she walked up the two steps to this back door, plaintiff testified that she could see the family sitting at the kitchen table. Plaintiff also could see defendant's two dogs, Tippy (a small dog) and Duke (the Great Dane), approaching the door. Having been to defendant's home many times before the incident, plaintiff testified she knew that defendant's dogs would run outside if the door was open. After inching the door open and announcing her presence, Tippy put her head through the door opening. Plaintiff bent over to pet Tippy and as she did so, Duke, who was unrestrained, forced himself through the opening of the doorway and dashed outside. Plaintiff's purse strap became hooked on Duke's neck as he passed plaintiff on the steps, and plaintiff was pulled backwards by the dog down the two steps onto the concrete patio. Plaintiff suffered a fractured left leg as a result of the incident, requiring surgery and rehabilitation.

Plaintiff thereafter initiated the instant action alleging a single count of negligence on the part of defendant for the personal injuries she received on her son's premises.[1] Defendant thereafter moved for summary disposition pursuant to MCR 2.116(C)(10), and, following oral argument, the trial court granted summary disposition in favor of defendant. Categorizing plaintiff as a licensee in a premises liability action, the trial court applied the open and obvious danger doctrine[2] and reasoned that:

> This factual situation, which involves a very large dog, a Great Dane, estimated at at least a hundred and eighty pounds, bolting out a door, which the plaintiff opened after she saw that the dog was unrestrained, was an open and obvious danger. I find there is no genuine issue of fact with regard to that. The plaintiff appreciated that. She testified that the dogs would bolt through the door if it was open, they had a tendency to do that. Certainly any number of bad things could be anticipated when you look through a glass door, see a huge dog, there aren't many that are larger than a Great Dane, and then you open the door. You could either get bitten, although this didn't happen here, and she really didn't anticipate that would happen, but you could get knocked down by a dog of that size if she's standing on a porch, or even more unlikely, of course, would be the factual scenario that you have here where the dog caught its head in her purse and dragged her down, she fell over backwards and broke her leg. But, the fact of the matter is there's no general in [sic] issue of fact that this constitutes an open and obvious danger when you see the dog unrestrained, and you elect to open the

---

[1] Although plaintiff subsequently conceded that as a social guest in defendant's house she had licensee status, she alleged in pertinent part in her complaint that she was an invitee on the premises of defendant and that

> 12. The defendant owed the plaintiff, Bertha Myers, the duty to exercise due and reasonable care, including:
>
> a. Warning plaintiff, Bertha Myers, of the dangers that the defendant was aware of, or should have been aware of, including the great dane dog not being restrained at the time of plaintiff's arrival.
>
> b. Taking reasonable care to protect plaintiff, Bertha Myers, from foreseeable dangers, including, restraining the dog in its cage before the plaintiff's expected arrival.
>
> c. Protecting the plaintiff, Bertha Myers, from unreasonable risk of harm caused by a dangerous dog, including, restraining the dog in its cage upon gaining the knowledge that the plaintiff had arrived.

[2] See, generally, *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001); *Hughes v PMG Building, Inc*, 227 Mich App 1, 10-11; 574 NW2d 691 (1997); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993); *DeBoard v Fairwood Villas Condominiums Ass'n*, 193 Mich App 240, 241-242; 483 NW2d 422 (1992).

door. A person of average intelligence I think would certainly appreciate the danger of opening the door to someone's house when you saw a one-hundred-eighty-pound dog unrestrained, clearly visible on the inside.

II

Plaintiff now appeals from the trial court's order granting summary disposition to defendant. We affirm, albeit on different grounds than those articulated by the trial court.

We review the grant or denial of a motion for summary disposition de novo. *Haliw v City of Sterling Heights*, 464 Mich 297, 301-302; 627 NW2d 581 (2001); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden, supra* at 120. In evaluating a motion for summary disposition brought under subsection (C)(10), a court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Haliw, supra* at 302. Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* A party's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). *Maiden, supra* at 121. This subsection plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial. *Id.*

In the instant case, whether plaintiff's single-count complaint is construed as alleging either premises liability or ordinary negligence,[3] either theory of recovery is precluded under the circumstances and summary disposition was properly granted to defendant by the trial court.

In a premises liability action, a landowner is subject to liability for physical harm caused to a licensee by a condition on the land if, and only if, (1) the landowner knows or has reason to know of the condition and should realize that it involves *an unreasonable risk of harm* to the licensee, and should expect that the licensee will not discover or realize the danger, and (2) the landowner fails to exercise reasonable care to make the condition safe, or to warn the licensee of the condition and the risk involved, and (3) the licensee does not know or have reason to know of the condition and the risk involved. *Taylor v Laban*, 241 Mich App 449, 454-455; 616 NW2d 229 (2000), citing 2 Restatement Torts, 2d, § 342, p 210. See also *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000).

Here, even assuming arguendo that defendant's dog may be deemed a "condition on the land" in the context of a premises liability action, see, e.g., *Klimek v Drzewiecki*, 135 Mich App 115, 119; 352 NW2d 361 (1984), plaintiff has failed to demonstrate a genuine issue of material fact regarding whether defendant knew or should have known that the dog posed an unreasonable risk of harm to plaintiff. It is undisputed that the dog had a gentle disposition and

---

[3] In her appellate brief, plaintiff maintains that "there is a question whether this [action] can properly be classified as a premises liability case or whether it is an ordinary negligence . . . case. . . ." Indeed, plaintiff's complaint is ambiguous in this respect. See text *supra*, pp 2 n 1.

never exhibited any vicious inclinations. It is likewise undisputed that plaintiff visited defendant's residence frequently and was accustomed to the unrestrained dogs greeting her at the door without incident. Plaintiff never complained to defendant regarding the dog's behavior. While it might be anticipated that such a large dog might knock over and possibly injure a person if it jumped directly up on that person, such is not the scenario in this case. Here, in what even plaintiff characterized as a "freakish accident," an otherwise large friendly dog went out the door past plaintiff and inadvertently snared her purse strap, pulling plaintiff backwards and causing her to fall down the steps. We conclude that under these circumstances, reasonable minds could not conclude that defendants knew or should have known that the dog posed an unreasonable risk of harm to plaintiff. Therefore, under a premises liability theory, summary disposition in favor of defendant was appropriate.

Alternatively, if plaintiff's complaint is construed as pleading negligent failure to restrain the dog, summary disposition is likewise warranted. In *Trager v Thor*, 445 Mich 95, 105-106; 516 NW2d 69 (1994), our Supreme Court explained that

> Negligence actions in domestic animal injury cases have been recognized by the Court of Appeals, usually as an alternative theory of liability to a strict liability claim when scienter cannot be shown. *Rickrode v Wistinghausen*, 128 Mich App 240, 247-248; 340 NW2d 83 (1983); *Papke v Tribbey*, 68 Mich App 130, 135-136; 242 NW2d 38 (1976).
>
> In assessing whether duty exists in a negligence action of this type, it is necessary to keep in mind the normal characteristics of the animal that caused the injury, as well as any abnormally dangerous characteristics of which the defendant has knowledge. It is the province of the court to determine if duty exists. *Buczkowski v McKay*, 441 Mich 96; 490 NW2d 330 (1992), Prosser & Keeton, [Torts (5th ed)], *supra*, § 37, pp 235-238. Dogs, and some other domestic animals, are generally regarded as so unlikely to do substantial harm that their possessors have no duty to keep them under constant control. Consequently, a mere failure to do so would not constitute a breach of any duty of care. 3 Restatement Torts, 2d, § 518, comments g and j, pp 31, 32. However, if the possessor of such an animal . . . has knowledge of some dangerous propensity unique to the particular animal, or is aware that the animal is in such a situation that a danger of foreseeable harm might arise, the possessor has a legally recognized duty to control the animal to an extent reasonable to guard against that foreseeable danger. *Id*., comment k, pp 32-33. We therefore adopt the following rule from *Arnold* [*v Laird*, 94 Wash 2d 867; 621 P2d 138 (1980)], *supra*, p 871, and hold that in a domestic animal injury case:
>
> "[A] negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence. The amount of control required is that which would be exercised by a reasonable person based upon the total situation at that time, including the past behavior of the animal and the injuries that could have been reasonably foreseen." [Footnotes omitted.]

In sum, applying these principles to the case at hand, in order to sustain her negligent failure to restrain or control claim, plaintiff has to show that defendant ineffectively controlled the dog in a situation where it would reasonably be expected that injury could occur. *Id*. As indicated earlier, plaintiff presented no evidence that defendant had reason to expect that Duke would harm someone, even inadvertently. Moreover, there is nothing in the record that indicates that defendant knew or should have known of any *abnormally dangerous propensities* that would have imposed on him a duty to restrain the dog. See text, issue III, *infra*. In addition, it was simply not reasonably foreseeable that Duke would become entangled in plaintiff's purse strap, causing her to be pulled backwards down the steps. Accordingly, plaintiff failed to make a prima facie case of negligent failure to restrain or control the dog. *Trager, supra*.

Therefore, the trial court did not err in granting defendant's motion for summary disposition and we affirm the trial court's order, though on different grounds than those articulated by the trial court.[4]

III

Plaintiff next contends that the trial court erred in refusing to permit her to amend her complaint to plead a common-law strict liability claim against defendant. Plaintiff advanced the theory of strict liability in her brief in opposition to defendant's motion for summary disposition. However, the trial court concluded that plaintiff did not plead strict liability in her complaint and it would not allow an amendment because it would be futile:

> The common law strict liability theory that is advanced in the plaintiff's brief was not pled, and the Court concludes that leave to amend should not be granted, as it would be futile. There's no abnormally dangerous propensity here known to exist with respect to this dog by the dog owner, and there's certainly no negligence. The dog was confined in the home. It's the plaintiff that opened the door allowing the dog to escape, and consequently resulted in her fall. The plaintiff, as has been correctly argued here by the defendant, had other options. She could have rung the doorbell. She could have and probably should have waited until her son had restrained the dog. I believe she said that that had happened in the past. She didn't wait this time. She opened the door, and the injury resulted.

We review a trial court's decision to deny a motion to amend a complaint to determine whether the trial court abused its discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Dowerk v Oxford Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). When a trial court grants summary disposition pursuant to MCR 2.116(C)(8),(9), or (10), the opportunity for the non-prevailing party to amend its pleadings pursuant to MCR 2.118 should be freely granted, unless the amendment would not be justified. MCR 2.116(l)(5). An amendment would not be

---

[4] In light of our determinations set forth above, we need not address, and express no opinion on, whether the trial court properly found that defendant's dog constituted an open and obvious dangerous condition on the premises of which plaintiff should have been aware.

justified if it would be futile. *Weymers, supra* at 658; *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 696; 588 NW2d 715 (1998). "An amendment would be futile if, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991).

In *Trager, supra* at 99, the Court stated:

> There has long existed at common law a cause of action against possessors of certain domestic animals for harm caused by those animals, regardless of fault. This common-law theory of strict liability is accurately stated in 3 Restatement Torts, 2d, § 509, p 15, as follows:
>
> "(1) A possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm.
>
> (2) This liability is limited to harm that results from the abnormally dangerous propensity of which the possessor knows or has reason to know."
>
> Strict liability attaches for harm done by a domestic animal where three elements are present: (1) one is the possessor of the animal, (2) one has scienter of the animal's abnormal dangerous propensities, and (3) the harm results from the dangerous propensity that was known or should have been known.

Here, plaintiff contends that she should be permitted to amend her pleadings to allege common-law strict liability. The alleged abnormal dangerous propensity that plaintiff identifies is the fact that defendant's dog Duke has run out through open doors in the past. However, we agree with the trial court that such behavior does not constitute "an abnormally dangerous propensity known to exist with respect to this dog by the dog owner. . . ." The fact that defendant's dog took the opportunity to go outside when plaintiff opened the door is nothing unusual or abnormally dangerous. It is uncontested that plaintiff's dog did not bite, scratch, run into or knock plaintiff down. Plaintiff described Duke as a very gentle dog and admitted he did not bite her. Duke did not pose a threat to plaintiff or engage in any threatening behavior. *Instead, the dog engaged in very ordinary and normal canine behavior when presented with an opportunity to go outdoors*. Certainly, a dog running out an open door does not amount to an "abnormal dangerous propensity" required for strict liability under a common law theory. It was plaintiff's misfortune in having the strap of her purse become entangled with the large dog that caused her to be pulled backwards down the steps. The harm did not result from a dangerous propensity that was known or should have been known. *Trager, supra* at 99.

We therefore conclude that the trial court did not abuse its discretion when it denied plaintiff's motion to amend her complaint on the ground that such an amendment would be futile.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Christopher M. Murray